Supreme Court, U. S.
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No. 79-1984

In the Supreme Court of the United States

WILLIAM MICHAEL STRUBE,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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SUMMARY OF ARGUMENT

Pennsylvania's "rape shield" law, rather than being a discovery device, was intended as a form of protection of a rape victim's privacy. As such, it is not unconstitutional as violative of due process because it does not afford the Commonwealth an evidentiary advantage nor does it work to the detriment of petitioner. The Fifth Amendment is not violated by accelerating the timing of disclosure of elements of the defense. Petitioner's other claims were not raised in the trial court and have not been properly preserved for review.

ARGUMENT

Two (2) of the arguments advanced by petitioner have not been properly raised and preserved in the state courts below. Therefore, they may be considered to have been waived. *Argument* (1), found at pages 11-13 of the Petition for Writ of Certiorari, that there is no rational basis, nor necessity for the existence of Pennsylvania's "rape shield" law, 18 Pa. C.S. §3104, was not raised in the trial court. Nor was it raised in the Pennsylvania Superior Court. The issue appeared for the first time in petitioner's petition for allowance of appeal to the Pennsylvania Supreme Court. Under Pennsylvania law, failure to raise an issue in the trial court and to preserve it for review on direct appeal to the Superior Court constitutes a waiver thereof. *Commonwealth v. Blair,* 460 Pa. 31, 331 A.2d 213 (1975). Failure to present a federal question in conformance with state procedure is an adequate and independent ground barring review in the United States Supreme Court. *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 (1965).

Similarly, the argument set forth in part (3) (b) of the *argument* section of the Petition, pp. 11, 15, based upon *Brooks v. Tennessee,* 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed. 2d 358 (1972), was not raised or presented at all in the state court system. Federal constitutional issues not raised, preserved or passed upon in state courts below will not be considered in the United States Supreme Court. *Cardinale v. Louisiana,* 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969).

Argument

Petitioner argues that the act in question forces an accused to reveal his defense prior to trial, without requiring the Commonwealth to reveal its rebuttal, in violation of the due process clause of the Fourteenth Amendment; and violates the Fifth Amendment right to remain silent by requiring a written motion and offer of proof at the time of trial. With respect to the first part of the constitutional claim, as applied to this case, the statute merely required petitioner to present his evidence as to the victim's past sexual conduct with him "at the time of trial" so that the trial court could make findings as to its relevance and admissibility. 18 Pa. C.S. §3104(b). As such it was nothing more than a mere offer of proof. In this case, it was done after the case was attached for trial, but before a jury was empaneled and sworn. It consisted of the petitioner's testimony. The court asked him a few questions. He was not cross-examined. The court then ruled the evidence relevant and admissible. This procedure merely constituted an accelerated ruling on an issue arising during the trial.

Petitioner's argument is based upon analogy to *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973), which held a notice-of-alibi statute unconstitutional as violative of due process because it did not provide for reciprocal discovery rights for the accused. Petitioner contends that the "rape shield" statute suffers from the same defect in that the Commonwealth is not required to divulge what evidence it will use to refute a defendant's evidence of past sexual conduct. In the case *sub judice,* the only evidence utilized by the Commonwealth was the testimony of the victim on rebuttal. The evil addressed in *Wardius* was the benefit accruing to the

state of non-reciprocal discovery rights. That evil is not present in 18 Pa. C.S. §3104, for the divulgence occurs "at the time of trial", not five (5) days beforehand as in *Wardius*. Thus the Commonwealth does not have time to prepare to offset this evidence, as is exemplified by the case at bar. Absolutely no benefit was obtained by the Commonwealth from petitioner's disclosure. Petitioner suffered no actual prejudice. The victim's denial and rebuttal was not made possible by the evidentiary hearing. Petitioner was not subjected to the hazard of surprise concerning refutation of his defense. He knew long before the trial that the victim would provide refutation evidence and had plently of opportunity to "discover" her.

There can be no doubt that the "rape shield" statute was not intended as a discovery device. Its effect is also unlike a discovery procedure, because the defense is not revealed until the time of trial. Under this statute, the motion, offer and in-camera hearing are required only before any evidence of past sexual conduct is presented. Hence the procedure need not be followed until after the Commonwealth has presented its case and rested. This, without a doubt, would not create a problem vis-a-vis reciprocity of discovery. Should the statute be interpreted to require the motion, offer and in-camera hearing at the commencement of the trial, as in the case at bar, no problem arises. The procedure is akin to a motion in limine, see Bailey and Rothblatt, *Successful Techniques For Criminal Trials*, §62.1 et seq.; Annot. 63 A.L.R. 3d 311 (1975), in that the court entertains an evidentiary ruling prior to the time when the evidence is actually offered. The defense is not put at any disadvantage because the Commonwealth has little or no extra time to prepare rebuttal evi-

dence, investigate witnesses, or explore weaknesses in stories. *Wardius* involved a procedural device designed to strengthen the State's case. With that in mind, the Supreme Court held "that in the absence of a strong showing of state interest to the contrary, discovery must be a two-way street". 37 L.Ed. 2d 88, 412 U.S. 475. The "rape shield" law is an expression of the Commonwealth's interest in protecting rape victims' right to privacy, which could be the compelling interest mentioned by the Supreme Court.

The statute does not violate an accused's privilege against self-incrimination. The same argument was raised as to a notice-of-alibi statute in *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed. 2d 446 (1970). There it was held that the requirement to reveal his defense prior to trial merely compelled an accused to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which he from the beginning planned to divulge at trial.

> Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

26 L.Ed. 2d p. 452, 399 U.S. p. 85.

As with the statute in *Williams v. Florida,* supra, the defense is not compelled by the statute involved here. The accused has a choice whether to present the defense or not, and he can deviate from the defense.

Argument

> The defendant in a criminal trial is frequently forced to testify himself and call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

399 U.S. 83, 84, 26 L.Ed. 2d 451. Cf. *Commonwealth v. Pritchett,* 225 Pa. Superior Ct. 401, 312 A.2d 434 (1973) (requiring defendant to indicate in some detail his possible defense does not violate the right to remain silent); *People v. Blackburn,* 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976) (California's version of "rape shield" law does not violate privilege against self-incrimination).

CONCLUSION

The Commonwealth of Pennsylvania submits that the issues presented by petitioner have not been properly preserved for review by Your Honorable Court or are not of the magnitude to warrant the issuance of a writ of certiorari. Therefore, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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